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 7 McKESSON CORPORATION

8
 9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA

11
 12 McKESSON CORPORATION, a Delaware
 corporation,

13 Plaintiff,
 v.

14 FAMILYMEDS GROUP, INC.,
 f/k/a Drugmax, Inc., a Connecticut corporation,

15 Defendant.

16
 17 FAMILYMEDS GROUP, INC.,
 f/k/a Drugmax, Inc., a Connecticut corporation,

18 Counterclaimant,
 v.

20
 21 McKESSON CORPORATION, a Delaware
 corporation,

22 Counterdefendant.

23
 24 FAMILYMEDS, INC.,
 a Connecticut corporation,

25 Cross-Complainant,
 v.

26
 27 McKESSON CORPORATION, a Delaware
 corporation,

28 Cross-Defendant.

Case No. 4:07-cv-05715 WDB

AMENDED

**NOTICE OF MOTION, MOTION AND
 MEMORANDUM OF POINTS AND
 AUTHORITIES OF MCKESSON
 CORPORATION SEEKING TO
 DISMISS:**

**(1) COUNTERCLAIM FOR SPECIFIC
 PERFORMANCE OF CONTRACT
 AND ACCOUNTING; AND**

**(2) CROSS-COMPLAINT FOR
 ACCOUNTING**

Complaint Filed: November 9, 2007
 Cross-Complaint Filed: December 17, 2007

Date: March 12, 2008

Time: 3:00 pm

Place: Ctrm 4

1301 Clay St., 3d Floor
 Oakland, CA

NOTICE OF MOTION

PLEASE TAKE NOTICE that on **March 12, 2008** at **3:00 p.m.** in the above referenced Court, or as soon thereafter as the matter may be called, **McKESSON CORPORATION**, a Delaware corporation (“**McKesson**”) will move this Court for an order dismissing that certain “Counterclaim for Specific Performance of Contract and Accounting; Cross-Complaint for Accounting” (the “Cross-Complaint & Counterclaim”) filed by **FAMILYMEDS GROUP, INC.**, f/k/a Drugmax, Inc. (“**Familymeds Group**”) and **FAMILYMEDS, INC.**, a Connecticut corporation (“**Familymeds, Inc.**”).

MOTION

McKesson hereby moves this Court for an order dismissing the Cross-Complaint & Counterclaim on the bases (among others) that:

(1) the joinder of a stranger to the action as a Cross-Complainant (not a third party defendant) against McKesson is not permitted pursuant to Federal Rule of Civil Procedure (“FRCP”) 14 and the Cross-Complaint & Counterclaim must therefore be dismissed;

(2) the Cross-Complaint & Counterclaim violates FRCP 19 and FRCP 12(b)(7) because it fails to name D&K Healthcare Resources, Inc. (“D&K”) as a party to the action notwithstanding that D&K (and not McKesson) is the entity that signed one of the contracts that Familymeds Group seeks to enforce through the Cross-Complaint & Counterclaim; and

(3) the Third Claim for Relief in the Cross-Complaint & Counterclaim fails to state a claim against McKesson for which relief can be granted such that dismissal thereof is mandated by FRCP 12(b)(6).

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF ISSUES TO BE DECIDED.

3 On November 9, 2007, McKESSON CORPORATION, a Delaware corporation
4 (“McKesson”) filed a complaint (the “Complaint”) for breach of contract against a single
5 defendant, FAMILYMEDS GROUP, INC., f/k/a Drugmax, Inc. (“Familymeds Group”). On or
6 about December 17, 2007, McKesson was served not only with an answer to the Complaint, but
7 also with a pleading entitled “Counterclaim for Specific Performance of Contract and Accounting;
8 Cross-Complaint for Accounting” (the “Cross-Complaint & Counterclaim”). Pursuant to its
9 motion and this memorandum of points and authorities, McKesson requests that this Court dismiss
10 the Cross-Complaint & Counterclaim. The bases for that request are that the Cross-Complaint &
11 Counterclaim adds a new party to this action not as a third party defendant under FRCP 14, but
12 rather as a *cross-complainant*. Specifically, the cross –complainant named in the Cross-Complaint
13 & Counterclaim is not Familymeds Group, but rather is Familymeds, Inc., a Connecticut
14 corporation, which according to the Cross-Complaint & Counterclaim is a subsidiary of
15 Familymeds Group. In addition, the Cross-Complaint & Counterclaim should be dismissed for the
16 failure to name a necessary party as a third party defendant: D&K Healthcare Resources, Inc.
17 (“D&K”). D&K is a necessary party because the Cross-Complaint & Counterclaim purports to
18 seek to enforce contract not mentioned in the Complaint, against McKesson, yet the contract at
19 issue is not a contract to which McKesson is a party. The party to the contract is D&K. Contract
20 parties are necessary parties to an action to enforce the contract. Finally, the Cross-Complaint &
21 Counterclaim, or at least the third claim for relief asserted therein, should be dismissed pursuant to
22 FRCP 12(b)(6) for failure to state an claim against McKesson for which relief may be granted.

II. STATEMENT OF FACTS.

The Complaint filed by McKesson against Familiy whole Group is a simple breach of contract complaint seeking to collect sums owing for the purchase by Familiy whole Group of products from McKesson under the terms of a contract entitled "Supply Agreement" which was dated February 2, 2007 and executed by Familiy whole Group and McKesson and no other parties.

In response, McKesson received not only an answer from Familiy whole Group, but the Cross-Complaint & Counterclaim which alleges three claims for relief against McKesson. The trouble is that at least one, possibly more, of those claims for relief are brought by an entirely new entity, Familiy whole Inc., and appear to be based on an agreement other than the contract that is the subject of the Complaint: a December 28, 2004 contract between Familiy whole Inc., Valley Drug Company and D&K, which is defined in the Cross-Complaint & Counterclaim as the "First Agreement."

The result is a muddled pleading situation and a fatally defective Cross-Complaint & Counterclaim that should be dismissed.

III. ARGUMENT.

A. Defendant Cannot Add a Third Party Cross-Complainant to the Instant Action.

16 Federal Rule of Civil Procedure (“FRCP”) 14 governs the addition of parties to an action by
17 a defendant. As was summarized by the Ninth Circuit in *Stewart v. Am. Int'l Oil & Gas Co.*, 845
18 F.2d 196, 199 (9th Cir. 1988):

Fed. R. Civ. P. 14(a) allows a defending party to bring in as third-party defendant a person not a party to the action who is or may be liable to him for all or part of plaintiff's claim against him. Thus, a third-party claim may be asserted only when the third party's liability is in some way dependent on the outcome of the main claim and is secondary or derivative thereto.

²² (Emphasis added.). The *Stewart* court continued, quoting Professors Wright and Miller:

... [the claim] cannot simply be an independent or related claim but *must be based upon plaintiff's claim against defendant*. The crucial characteristic of a Rule 14 claim is that defendant is attempting to transfer to the third-party defendant the liability asserted against him by the original plaintiff. The mere fact that the alleged third-party claim arises from the same transaction or set of facts as the original claim is not enough.

1 *Id.* at 200 (emphasis added)(citing 6 FED. PRAC. & PROC. § 1446 at 257 (1971 ed.)). Because the
 2 defendant in *Stewart* failed to meet the requirements of FRCP 14 in bringing a third party
 3 complaint, the Ninth Circuit affirmed the District Court's dismissal of the third party complaint.

4 Here, Familymeds Group has not added a third party *defendant* in filing the Cross-
 5 Complaint & Counterclaim, nor does the Cross-Complaint & Counterclaim relate to the facts of the
 6 original Complaint. Instead, Familymeds Group has tacked on to the instant case an entirely new
 7 action brought by an entirely new entity, Familymeds, Inc., based on an entirely new contract, the
 8 so-called "First Agreement." The instant Cross-Complaint & Counterclaim does not properly or
 9 permissibly add a party pursuant to FRCP 14 to this action and is not permitted by FRCP 7¹ or any
 10 of the other Federal Rules of Civil Procedure. The Cross-Complaint & Counterclaim should be
 11 dismissed.

12 **B. Familymeds Group Cannot Assert Claims Against D&K Healthcare Resources
 13 Inc. Without Naming D&K Healthcare Resources Inc. as a Party.**

14 In addition to the fatal defect relating to the improper application of FRCP 14, the Cross-
 15 Complaint & Counterclaim is fatally flawed in that it asserts claims against a new entity that is not
 16 named as a party in the Cross-Complaint & Counterclaim. Specifically, in paragraph 11 of the
 17 Cross-Complaint & Counterclaim, the Cross-Complaint & Counterclaim makes reference to a
 18 contract defined as the "First Agreement" which is described as an agreement entered into on
 19 December 28, 2004 by and among Familymeds, Inc., Valley Drug Company and D&K Healthcare
 20 Resources Inc. It appears that the Cross-Complaint & Counterclaim is making claims against
 21 McKesson based on that contract though the contract with D&K—an entity that still exists as a
 22 separate corporate entity. FRCP 19(a) provides in pertinent part:

23
 24 ¹ FRCP 7(a) provides:
 25 There shall be a complaint and an answer; a reply to a counterclaim denominated as such; and answer to a cross-
 26 claim, if the answer contains a cross-claim; a third party complaint, if a person who was not an original party
 27 is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No
 other pleading shall be allowed, except that the court may order a reply to an answer of a third-party answer.
 (Emphasis added.)

1 (a) **Persons Required to Be Joined if Feasible.** A person who is subject to service of
 2 process and whose joinder will not deprive the court of jurisdiction over the subject
 3 matter of the action shall be joined as a party in the action if:
 4 (1) in that person's absence complete relief cannot be accorded among those already
 parties; or
 5 (2) the person claims an interest relating to the subject of the action and is so
 situated that the disposition of the action in the person's absence may:
 6 (i) as a practical matter impair or impede the person's ability to protect that
 interest or
 7 (ii) leave any of the persons already parties subject to a substantial risk of
 incurring double, multiple, or otherwise inconsistent obligations by reason of the
 8 claimed interest.

9 The Court cannot accord complete relief to McKesson and Familiy whole Group if D&K is not a
 10 participant to this action inasmuch as Familiy whole Group cannot get relief with respect to the First
 11 Agreement against McKesson; remedies under the First Agreement, assuming it has been breached,
 12 will lie only against D&K.

13 Clearly, it is incumbent upon Familiy whole Group to name D&K as a third party defendant
 14 in this action if it (or Familiy whole, Inc. in a properly plead action) seeks to enforce any claims
 15 based on the First Agreement. "Generally, in breach of contract actions, all parties to the contract
 16 are necessary ones." *Rojas v. Loewen Group Int'l*, 178 F.R.D. 356, 361 (D.C. Puerto Rico 1998).
 17 Allegations that McKesson is somehow the alter ego of D&K do not cure this defect. See, *id.* at
 18 363-64. Thus because Familiy whole Group has failed to join D&K which is a necessary party
 19 pursuant to FRCP 19, the Cross-Complaint & Counterclaim should be dismissed pursuant to FRCP
 20 12(b)(7). This should not be problematic in this action because joinder of D&K will not destroy
 21 diversity and it is feasible to join D&K.

22 **C. The Third Claim for Relief in the Cross-Complaint & Counterclaim Should be
 23 Dismissed or Stricken Pursuant to FRCP 12(b)(6).**

24 Alternatively, if the entire Cross-Complaint & Counterclaim is not dismissed, the Third
 25 Claim for Relief should be dismissed or stricken. It appears to allege a claim by Familiy whole, Inc.
 26 against McKesson based on the First Agreement. However, McKesson is not a party to the First

1 Agreement and therefore no relief may be had by Familymeds, Inc. against McKesson based on
2 that agreement. The Third Claim for Relief should be dismissed or stricken.

3 **IV. CONCLUSION.**

4 The Cross-Complaint & Counterclaim contains fatal defects. It should be dismissed in its
5 entirety. At a minimum, all request for relief contained in the Third Claim for Relief should be
6 dismissed or stricken.

7
8 DATED: January 14, 2008.

HENDERSON & CAVERLY LLP
By: Maria K. Pum
Attorneys for McKesson Corporation

PROOF OF SERVICE

I am employed in the County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is Henderson & Caverly LLP, P.O. Box 9144, 16236 San Dieguito Road, Suite 4-13, Rancho Santa Fe, California 92067.

On January 14, 2008, I served the foregoing:

**AMENDED NOTICE OF MOTION, MOTION AND MEMORANDUM OF POINTS
AND AUTHORITIES OF McKESSON CORPORATION SEEKING TO DISMISS:**

(1) COUNTERCLAIM FOR SPECIFIC PERFORMANCE OF CONTRACT AND ACCOUNTING; AND

(2) CROSS-COMPLAINT FOR ACCOUNTING

on the following parties in this action in the manner set forth below:

Robert C. Gebhardt, Esq.
Jeffer, Mangels, Butler & Marmaro LLP
Two Embarcadero Center, Fifth Floor
San Francisco, California 94111-3824

- (BY MAIL) I placed each such sealed envelope, with postage thereon fully prepaid for first-class mail, for collection and mailing at Henderson & Caverly LLP, Rancho Santa Fe, California, following ordinary business practices. I am familiar with the practice of Henderson & Caverly LLP for collection and processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal service the same day as it is placed for collection.
- (BY EMAIL) I electronically filed such document using the ("CM/ECF") system which will send a Notice Of Electronic Filing to CM/ECF participants.
- (BY FACSIMILE) I transmitted the above-listed document to the party listed above via facsimile. The transmission was reported complete and without error. The telephone number of the facsimile machine I used was (858) 756-4732.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed at Rancho Santa Fe, California on January 14, 2008.


Quynh N. Nguyen